Supreme Court, U.S.
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No. 02-

In the Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,

Petitioner,

v.

SEAN GREENE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Metropolitan Transportation Authority (MTA) is a "public authority" created by the New York State Legislature to develop and coordinate a comprehensive system of regional commuter transportation. The MTA owns separately incorporated interstate railroads (the Long Island Rail Road and Metro-North Railroad), as well as a municipal subway and bus system and several intra-city toll bridges and tunnels. The Court of Appeals for the Second Circuit rejected the MTA's claim of sovereign immunity under the Eleventh Amendment. The court also held that the MTA's ownership and control of the separately incorporated railroads made the MTA itself a "common carrier by railroad" under the Federal Employers' Liability Act, 45 U.S.C. § 51 (FELA), so that an employee of the MTA Police Department could sue the agency in federal court for injuries he sustained in a job-related highway traffic accident. There is a conflict between those rulings and decisions of this Court and other circuits on the following questions:

1. In light of the Court's decisions overruling *Parden* v. *Terminal Railway Co. of Alabama State Docks Department*, 377 U.S. 184 (1964), and clarifying the reach of the Eleventh Amendment, does sovereign immunity protect State-created regional transportation agencies from private damage suits brought by their employees invoking the Federal Employers' Liability Act?

2. Is the term "common carrier by railroad" in the Federal Employers' Liability Act properly limited to railroads, the entities that actually provide transportation services, or should the term be extended to include State agencies and parent corporations that are not themselves railroads, but own separately incorporated railroads?

3. Must common-law standards for "piercing the corporate veil" be used to determine whether the parent of an operating railroad may be subjected to the Federal Employers' Liability Act as a "common carrier by railroad"?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND RULE 29.6 STATEMENT

Petitioner MTA is a State-created public authority and has not issued any stock to the public or to any parent or publicly held company.

Respondent Sean Greene is an individual.

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The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported at 280 F.3d 224 (2002). Its order denying sovereign immunity (Pet App. 29a) is unreported. The opinion of the District Court (Pet. App. 32a) is reported at 99 F. Supp.2d 268 (E.D.N.Y. 2000).

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 2002. A timely petition for rehearing and rehearing *en banc* was denied on November 13, 2002 (Pet. App. 46a). This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*(FELA), are set forth at Pet. App. 48a.

STATEMENT

A. Factual Background

1. The New York Legislature created the MTA in 1965 as part of the State's Public Authorities Law. See N.Y. Public Authorities Law ("Pub. Auth. L.") § 1263(1)(a) (McKinney 1999). The Governor of New York appoints the MTA's board of directors with the advice and consent of the State Senate. As discussed more extensively in the Reasons for Granting the Writ, *infra*, New York law considers "public authorities" to be "state agencies" carrying out important governmental functions. As specified in Section 1264(1) of the Public Authorities Law, the MTA's responsibilities include:

> "[T]he continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district, including but not limited to such transportation by railroad, omnibus, marine and air * * *."

The statute authorizes the MTA to exercise these powers itself or to delegate them to "one or more wholly owned subsidiary corporations." Pub. Auth. L. § 1266(5). Pursuant to this provision, the MTA owns or oversees the following subsidiaries: New York City Transit Authority (the City's subways and buses), several other bus companies, the Triborough Bridge and Tunnel Authority (toll bridges and tunnels), and two commuter railroads, the Long Island Rail Road Company (LIRR) and Metro-North Commuter Railroad Company. The FELA issue presented by this case is whether the MTA is properly treated as a "common carrier by railroad" under the Act solely because it supervises the financial and ancillary affairs of and owns one of its corporate subsidiaries, the Long Island Rail Road, which is a "common carrier by railroad" under FELA.

The MTA and its operating subsidiaries have their own separate work forces with separate labor contracts. Collectively, the subsidiaries employ some 60,000 workers. The MTA itself has approximately 1,000 of its own employees. Each of the subsidiaries, including the LIRR, conducts its own operations with varying degrees of oversight from the MTA as necessary to achieve the Legislature's goal of assuring an efficient, coordinated, regional transportation network.

In 1997, the Legislature authorized the MTA to create a single police department for all of its operations and those of its subsidiaries. Pub. Auth. L. § 1266-h(1). Pursuant to this statute, the MTA consolidated the separate police forces that its subsidiaries had maintained, forming the MTA Police Department. Respondent Sean Greene, a former LIRR police officer, invoked his right under Pub. Auth. L. § 1266-h(2) to become a member of the new MTA Police Department and hence an employee of the MTA.

2. In March 1998, Greene was involved in an automobile accident while responding to a reported auto theft at a parking lot near an LIRR train station. His car collided with another vehicle on a public street. Claiming disabling injuries, he received $80,000 from the MTA in unlimited sick

pay and medical benefits.

B. Proceedings Below

1. Despite receiving worker's compensation benefits, Greene brought suit under FELA in the United States District Court for the Eastern District of New York, asserting claims against the MTA for personal injuries arising out of the automobile accident. FELA authorizes an employee of an interstate "common carrier by railroad" to bring suit against the "carrier" in a federal court for injuries caused by the negligence "of such carrier." 45 U.S.C. § 51. Greene alleged that the MTA was negligent in failing to provide him with safe working conditions, namely a safer automobile. The MTA moved to dismiss, arguing that the MTA is not subject to FELA because the MTA — as distinct from the LIRR — is not a "common carrier by railroad" under the Act and thus that the MTA's employees may not assert a cause of action under the Act.

The district court "reluctantly" denied the motion and applied what it called this "outmoded" statute to the MTA. Pet. App. 33a. The court acknowledged that the MTA and the LIRR are separate legal entities.[1] The court held, however, that an entity is a covered common carrier if it "operates" a railroad and that, by virtue of the MTA's "extensive involvement" in the LIRR's activities, the MTA "operates" the railroad. Pet. App. 43a. The court rejected as irrelevant the New York case law holding, under common law "veil piercing" standards, that the MTA is not legally responsible for its subsidiary railroads' operations. The court declared that "it is not the corporate form of the entity" that determines an entity's status, but the "functions" it performs. The court ruled that FELA requires "nothing more" on the part of a parent "than to 'perform a function'" in connection

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[1] The New York Legislature chartered the LIRR in 1834. It is the largest commuter railroad in America and the oldest railroad of any kind still operating under its original name. In 1980, the LIRR became a wholly owned corporate subsidiary of the MTA.

with the subsidiary's railroad activities. Pet. App. 42a. Accordingly, the court held that the MTA, as the parent of the LIRR, is equally subject to FELA liability as a "common carrier by railroad." Recognizing that this ruling involved a "controlling question of law," the district court certified it for immediate appeal pursuant to 28 U.S.C. § 1292(b).

2. The Second Circuit allowed the appeal and affirmed. Pet. App. 1a. The court never suggested that the MTA is actually a "railroad." Instead, asserting that FELA reaches any entity that is substantially involved in the "management and operation of the business" of a railroad, the court held the MTA subject to FELA liability because the agency exercises a supervisory and managerial role over the ***financial and ancillary*** affairs of the LIRR. Pet. App. 8a, 20a-27a. The court focused on the MTA's involvement "in essential business aspects of LIRR operations as well as in providing police services that are directly in furtherance of LIRR's business as a railroad." Pet. App. 27a. The court also pointed to the MTA's "participation in the budgeting, capital raising, marketing, advertising, real estate, risk management, and labor relations aspects of LIRR operations." Pet. App. 26a.

Like the district court, the Second Circuit rejected the MTA's argument that the MTA could not be treated as a "common carrier by railroad" under FELA unless the formal, legal distinction between the MTA and the LIRR was essentially a sham under the common-law doctrine allowing courts to "pierce the corporate veil."

3. While the MTA's timely rehearing petition was pending, this Court decided *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002). There a majority of the Court declared, contrary to Second Circuit precedent, see *Feeney* v. *Port Authority Trans-Hudson*, 873 F.2d 628 (1989), aff'd on other grounds, 495 U.S. 299 (1990), that a State agency may invoke sovereign immunity without demonstrating that a judgment against it would have the same effect on the State treasury as a

judgment directly against the State itself. Since sovereign immunity may be invoked at any stage of the proceedings, *Calderon* v. *Ashmus*, 523 U.S. 740, 745 n.2 (1998), the MTA promptly filed a motion invoking the State's immunity under the Eleventh Amendment and requesting that the court vacate its judgment and remand with directions to dismiss.

While emphasizing the impact of *South Carolina State Ports* upon the Second Circuit's prior case law, the motion also explained that there is a substantial financial interconnection between the MTA and the State treasury. For the last nine years, the MTA has received on average $187 million a year from the State's general fund as part of the transportation assistance program (N.Y. Transp. L. § 18-b (McKinney 1999)) and approximately $1 billion a year in "dedicated taxes" (N.Y. Pub. Auth. L. § 1270-c).

The Second Circuit denied this motion as well as the MTA's petition for rehearing *en banc*. Pet. App. 29a, 46a.

REASONS FOR GRANTING THE WRIT

I. A State-Created Transportation Agency Is Entitled to the State's Sovereign Immunity from Employees' Personal Injury Suits under FELA.

1. The Court has repeatedly reminded lower courts that States remain separate sovereigns under the Constitution and, along with their agencies and instrumentalities, enjoy immunity from private federal causes of action for damages. *E.g.*, *South Carolina State Ports Auth.*, *supra*; *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55-57 (1996).

This Court's recent cases treat States and State agencies equivalently for Eleventh Amendment purposes. See, *e.g.*, *South Carolina State Ports Auth.*, 535 U.S. at __ (slip op. 5 n.6) (holding that the State Ports Authority "is protected by South Carolina's sovereign immunity because it is an arm of the State"); *Kimel*, 528 U.S. at 69 (treating State university as "an instrumentality of the State of Alabama" and upholding its claim to sovereign immunity); *Garrett*, 531 U.S. 356

(same). See also *California Med. Bd.* v. *Hason*, No. 02-479, certiorari granted, November 18, 2002 (Does Eleventh Amendment bar ADA suit against State medical board for denying medical license?).

2. The Court has recognized these principles in the specific context at issue here, holding that the Federal Constitution limits FELA's applicability to States that operate railroads. The background begins with the now-repudiated decision in *Parden* v. *Terminal Railway Co. of Alabama State Docks Department*, 377 U.S. 184, 186 (1964). There the Court held that the employee of a State-owned interstate railroad could sue the railroad in a federal court under FELA and that the State's sovereign status was no bar to applying FELA. The Court reasoned that (1) nothing in FELA explicitly exempted State-owned railroads from coverage and that (2) the State had "waived" whatever immunity it otherwise might have had by engaging in regulated interstate railroad operations.

Subsequent developments in the Court's federalism jurisprudence, however, led the Court to overrule both premises of *Parden*. In *Welch* v. *Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), the Court held that there was "no doubt" that *Parden*'s approach to State immunity "is no longer good law." The Court overruled *Parden* to the extent that it was "inconsistent with the requirement" that any congressional intent to regulate a State's activity and to abrogate the State's immunity — even if otherwise within Congress's constitutional power — "must be expressed in unmistakably clear language." *Id.* at 478. Then, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680 (1999), the Court overruled *Parden*'s theory of constructive waiver, holding it impossible to square with cases "requiring that a State's express waiver of sovereign immunity be unequivocal." Thus, the Court has now established that (1) FELA does not attempt to abrogate the States' sovereign immunity and (2) States do not waive their sovereign

immunity by engaging in interstate railroad operations.[2]

3. In light of the Court's subsequent treatment of *Parden*, there can be little doubt that a State-owned or operated railroad is constitutionally immune from damage suits under FELA. The plaintiff in *Parden* had brought suit against the "Terminal Railway, Alabama State Docks." *R.B. Parden* v. *Terminal Ry. of the Ala. State Docks Dept.*, 311 F.2d 727, 728 (5th Cir. 1963), rev'd, 377 U.S. 184 (1964). This Court accepted the Terminal Railway's status as "an agency of the State" (377 U.S. at 185) and decided the Eleventh Amendment questions without regard to the fact that the defendant was a State "agency" and not technically the State itself. The Court assumed that, but for its (subsequently rejected) view of implicit waivers of Eleventh Amendment immunity, the Terminal Railway would have qualified for immunity in its status as a State agency.

Now that the Court has swept away the two grounds for withholding immunity in *Parden*, the sovereign immunity of a State-owned railroad is patent. The Alabama Supreme Court, therefore, recently held that the Terminal Railway is entitled to Eleventh Amendment immunity from private FELA actions under this Court's current Eleventh Amendment jurisprudence. See *Alabama State Docks Terminal Ry.* v. *Lyles*, 797 So.2d 432, 438 (2001). The decision below thus conflicts with *Lyles*.

4. The Court's approach to the constitutional status of

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[2] FELA suits may be brought in the ***State courts*** of those "few States" that were deemed to "consent" to being sued in their own courts when they excluded railroad workers from their workers' compensation laws on the assumption that FELA would provide the compensation remedies for those workers. See *Alden* v. *Maine*, 527 U.S. 706, 737-38 (1999); *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991). This narrow exception has no bearing here. Greene was eligible for extensive benefits under New York's workers' compensation law and actually received more than $80,000 in benefits.

State instrumentalities, treating them as equivalent to the State itself for Eleventh Amendment purposes, cloaks the MTA with sovereign immunity from FELA claims. The principal functions that the MTA performs, providing and coordinating regional transportation, have traditionally been viewed as falling within the powers of a sovereign. See, *e.g.*, U.S. Const., Art. I, § 8, cl. 7 (authorizing Congress to establish post roads); *South Carolina State Ports Auth.*, 535 U.S at __ (slip op. 5 n.6) (applying sovereign immunity to a State "authority" created to "develop and improve" the State's harbors and ports); 49 U.S.C. §§ 101, 102 (creating U.S. Department of Transportation). Indeed, the precise function that Greene was performing when the accident occurred, providing police protection for the public, is itself a sovereign function. See *Foley* v. *Connelie*, 435 U.S. 291, 297 (1978) (recognizing that policing is a sovereign function); *Morris* v. *Washington Metro. Area Transit Auth. (WMATA)*, 781 F.2d 218, 220 (D.C. Cir. 1986) (same).

As the recent *South Carolina State Ports Authority* decision illustrates, a State Legislature's decision to assign the performance of sovereign functions to a "public authority" rather than an "executive department" is irrelevant. If the New York Legislature had designated a State executive department, such as the New York Department of Transportation, to perform the roles assigned to the MTA, there would be no doubt that the executive department would be immune from liability under FELA. Indeed, the MTA's co-venturer in overseeing the Metro-North railroad under a congressionally approved Compact between New York and Connecticut (Pub. L. 91-159, 83 Stat. 441 (1969)) is a State executive department, the Connecticut Department of Transportation. See N.Y. Transp. L., App. 5.

5. The MTA's constitutional status as an instrumentality of the State of New York, entitled to the State's sovereign immunity, is undeniable. The State itself views the MTA as its sovereign instrumentality. The MTA was created by special act of the New York Legislature under Article X,

Section 5, of the State Constitution governing creation of public authorities. The Governor appoints the MTA's board of directors, subject to confirmation by the State Senate; the Governor may remove them from office for misconduct or "neglect of duty." Pub. Auth. L. § 1263(1)(a), (7).

The Legislature treats the MTA as an organ of the State, declaring that the MTA is "performing an essential governmental function in carrying out its purposes." Pub. Auth. L. § 1264(2). It reiterated this policy in declaring that the MTA enjoys the State's tax exemption. Pub. Auth. L. § 1275. New York statutes characterize the MTA as a "state agency." Pub. Auth. L. § 1261(13); see Pub. Auth. L. § 1263(5) (noting that MTA is a State agency for certain purposes of the Public Officers Law). In *Easley* v. *New York State Thruway Authority*, 135 N.E.2d 572, 573 (N.Y. 1956), the State's highest court held that a "public authority" is "an arm or agency of the State" carrying out governmental functions. Various lower courts similarly have characterized the MTA as a "state agency" or as the "state's instrument." *E.g.*, *Roitman* v. *N.Y.C. Transit Auth.*, No. CV-88-0448, 1991 WL 81924, at *1 (E.D.NY. May 6, 1991); *Majer* v. *MTA*, No. 90 Civ. 4608, 1990 WL 212928, at *3 (S.D.N.Y. Dec. 14, 1990); *Kaelin* v. *Long Island R.R. Co.*, 504 F. Supp. 656, 658 (E.D.N.Y. 1980). Indeed, Officer Greene was covered by State statutes defining benefits for state employees, including benefits for job-related injuries, which he received.

The most direct proof of the State's intent on the immunity issue is Section 1276 of the Public Authorities Law. It gives the "consent of the state" to some persons to bring enumerated types of suits against the MTA, but limits that consent by imposing special procedural and temporal preconditions to suit. Greene's suit is ***not*** one of the enumerated types. MTA employees such as Greene are given an "exclusive" administrative remedy for work-related injuries, under Section 11 of the New York Workers' Compensation Law. In upholding the constitutionality of these limitations on the ability to sue the MTA, the New

York courts have expressly justified them as "condition[s] of the State's limited waiver of [the MTA's] sovereign immunity." *E.g.*, *Umansky* v. *MTA*, 491 N.Y.S.2d 33, 34 (App. Div. 1985) . Except to the extent that this "consent" has been given, therefore, the State assumes that the MTA shares in the State's sovereign immunity from suit.

In sum, the New York State Legislature vested the MTA with sovereign powers and treats the MTA as an organ of the State. Therefore, this Court's doctrine treating State agencies as the equivalent of the State in the eyes of the Eleventh Amendment bars FELA suits like this one.

6. Nevertheless, the Second Circuit allowed respondent Greene to proceed with his FELA suit despite the MTA's claim of sovereign immunity. The Second Circuit and the Third Circuit have concluded that transit agencies may not claim sovereign immunity unless money judgments against them would have "the same practical consequences as a judgment against the State itself." *Fitchik* v. *New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 660-62 (3d Cir. 1989) (*en banc*); *Feeney* v. *Port Auth. Trans-Hudson*, 873 F.2d 628 (2d Cir. 1989), aff'd on other grounds, 495 U.S. 299 (1990). Similarly, at least two circuits have concluded — even after *South Carolina State Ports Authority* — that impact of a judgment against a State agency upon the State's treasury is a critical factor in determining the agency's right to sovereign immunity. See *Aguon* v. *Commonwealth Ports Auth.*, No. 01-16613, 2003 WL 102994, *2 (9th Cir. Jan. 13, 2003); *Perez* v. *Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 326-27 (5th Cir. 2002).

Other circuits, by contrast, have recognized that State agencies like the MTA may claim sovereign immunity (except to the extent immunity has been waived), even if a judgment does not operate directly against the State treasury. See *Morris*, 781 F.2d at 220 (recognizing that D.C.-area transit agency performs governmental functions, including policing, and is entitled to sovereign immunity); *Abdulwali* v. *WMATA*, No. 01-7165, 2003 WL 104872 (D.C. Cir. Jan. 14,

2003) (same); cf. *Strykowski* v. *Northeast Ill. Regional Commuter R.R. Corp.*, 30 F.3d 136, 1994 WL 287395 (7th Cir. 1994) (unpublished) (raising issue of transit agency's Eleventh Amendment immunity *sua sponte* and remanding for adjudication).

This Court should resolve this circuit conflict. The impact-on-the-state-treasury test adopted by the Second and Third Circuits derives from divided opinions of this Court in *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), and *Hess* v. *Port Authority Trans-Husdon Corp.*, 513 U.S. 30 (1994). In *South Carolina State Ports Authority*, however, a majority of the Court rejected that test. The Court upheld immunity where the request for a cease-and-desist order directed against a State agency carried no financial consequences at all for the State treasury. The Court explained that the "primary function of sovereign immunity is not to protect State treasuries * * * but to afford the States the dignity and respect due sovereign entities." 535 U.S. at __ (slip op. 24).[3]

The Second Circuit should have recognized that construing FELA to authorize MTA employees to bring negligence claims against this State agency in a federal court conflicts with the Eleventh Amendment under the current, controlling standard. Not only did the court improperly federalize a local auto accident claim against a State-created agency, it disregarded the impact its decision will have upon

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[3] The dissenters in *South Carolina Ports Authority* disagreed with the Court's conclusion that the Eleventh Amendment constrains ***federal administrative tribunals*** from asserting jurisdiction over a State agency in its dispute with a private party, but agreed that the Eleventh Amendment precludes ***federal courts*** from asserting jurisdiction over a State instrumentality. See 535 U.S. at __ (slip op. 3) (Stevens, J., dissenting), *id.* at __ (slip op. 10) (Breyer, J., dissenting) (Eleventh Amendment bars "a private individual" from hauling a State agency into federal court to pursue a claim for damages).

the State's ability to regulate the quintessentially sovereign function of law enforcement by determining what rights and remedies are available to law-enforcement personnel injured in the line of duty. As explained below (pp. 27-28), this issue affects dozens of transportation agencies created by other States to perform functions similar to the MTA's.

II. The Second Circuit's Construction of FELA Is Inconsistent with Its Text and Legislative Purpose, Conflicts with Decisions of This Court and Other Circuits, and Distorts the Framework of Federal Regulation of "Railroads" by Federal Agencies.

An equally important issue is whether FELA applies at all to entities — government agencies or commercial companies — that own separately incorporated railroads.

A. Interpreting FELA As Subjecting State Agencies That Own Railroad Companies To Federal Liability For Local Work-Related Accidents Violates This Court's "Clear Statement Rule."

1. The New York Legislature assigned to the MTA the responsibility to improve and coordinate transportation services available to commuters in the New York metropolitan area. These are primarily matters of local concern within the authority of the States and their instrumentalities. As the Court emphasized just a few months ago: "Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *South Carolina State Ports Auth.*, 535 U.S. at __ (slip op. 6). Congress's authority to "legislate in areas traditionally regulated by the States" is an "extraordinary power" that is presumably "not exercise[d] lightly." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1988) (quoting *Atasacadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985)).

Therefore, before a court may accept an argument that

Congress has intruded into areas traditionally regulated by the States and that Congress has acted to "displace state regulation" over traditionally local activities, "the federal statutory purpose must be 'clear and manifest.'" *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quoting *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990)); cf. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This aspect of the "clear statement rule" is "rooted in * * * concepts of American federalism" and "assures that the legislature has in fact faced" and resolved the question whether to displace the States' primary responsibility for regulating matters of an essentially local nature. *United States* v. *Bass*, 404 U.S. 336, 349 (1971).

A policy of restraint in interpreting a federal statute is especially important when the issue is whether Congress created a federal cause of action allowing employees of a State agency to bring local accident claims against the agency in a federal court. The Court has held that Congress is presumed ***not*** to have created a federal claim against a State agency except "by clearly expressing such an intent," and the Court has construed ambiguous statutes to avoid impinging upon this important principle of federalism. *E.g.*, *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 779 (2000).

Moreover, recognition of a federal cause of action expands the jurisdiction of the federal courts. Here the only basis alleged for federal jurisdiction was FELA. It is presumed, however, that Congress has not expanded the jurisdiction of the federal courts, when the matter is questionable, even if there is a palpable federal interest at stake. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1102 (1991); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 91-94 (1981).

2. The Second Circuit's willingness to infer the existence of a federal cause of action against the MTA for local auto accident claims collides with these important principles.

Where FELA applies, it displaces state-law regulation of accidental injury claims. See, *e.g.*, *South Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 371 (1952). Congress originally enacted FELA in 1906 when various state common-law defenses denied railroad workers a meaningful opportunity to recover for their work-related injuries, despite the inherently dangerous nature of working on the railroad. FELA thus displaces traditional defenses such a contributory negligence (45 U.S.C. § 53), assumption of the risk (45 U.S.C § 54), and the fellow-servant doctrine (*Chesapeake & Ohio Ry.* v. *De Atley*, 241 U.S. 310 (1916)).

Congress focused, however, on extending federal protection to employees of interstate ***railroads*** injured in connection with railroading. It is impossible to discern any federal interest in creating a federal tort system for employees of State agencies (or commercial holding companies) that merely own and control operating railroads, especially where those employees (like Greene, a police officer injured in a local traffic accident) have nothing to do with railroading. Like other States, New York has a well-developed body of law that governs the claims of employees who suffer work-related injuries. Injured MTA employees are entitled to State benefits (see N.Y. Workers' Comp. L. § 2(3)), which the plaintiff in this case in fact received. In addition, the New York Legislature has carefully regulated the liability of the MTA by establishing specific preconditions that must be met before an action based on State law may be brought against it. Pub. Auth. L. § 1276.

To the extent FELA is found to apply to the State agency's own employees, as the court below held, the federal standards directly displace the State's legislative scheme. Interpreting FELA as broadly as the Second Circuit did, thus allowing MTA employees to circumvent the comprehensive State tort and worker compensation systems, intrudes upon an area traditionally regulated by the States. Greene's claim against the MTA is a run-of-the-mill auto-accident tort claim of the sort State courts and administrative tribunals (such as

workers' compensation boards) adjudicate every day under State law. There is ***no palpable federal interest*** to counterbalance the State's interests or to justify interpreting FELA so expansively that this type of dispute may automatically be brought into a federal court to be tried under federal standards of liability.

3. Not surprisingly, there is no "clear statement" in FELA that Congress intended to confer preemptive federal rights on employees of State agencies that own railroads or attempted to authorize federal courts to entertain such damage suits against State agencies. Since there was no such "clear and manifest" statement of congressional intent, the Second Circuit subverted this Court's doctrine by construing FELA as granting plaintiff a federal cause of action for a local tort claim against this State agency.

B. Extending FELA to Entities That Control Separately Incorporated Railroads Conflicts With This Court's Interpretation Of FELA, With FELA's Legislative Purpose, And With Decisions Of Other Circuits.

FELA gives employees of "common carriers by railroad" a federal cause of action for damages:

> "Every ***common carrier by railroad*** while engaging in interstate commerce * * * shall be liable in damages to any person suffering injury ***while he is employed by such carrier*** in such commerce * * * for such injury or death resulting in whole or in part ***from the negligence*** of any officers, agents or employees ***of such carrier*** * * *." 45 U.S.C. § 51 (emphasis added).

As construed by this Court, other federal circuits, and federal agencies, FELA's text only reaches "railroads" and employees of "railroads." No one questions that the MTA is not a "railroad." Despite the Second Circuit's decision to extend the statute to other agencies and companies, the statute as drafted does not cover parent companies or State agencies that are not themselves "railroads" but ***own***

separately incorporated railroads.

1. *Conflict With This Court's Decisions.* Originally enacted in 1906, FELA was designed to create an adequate federal remedy for persons engaged in what was viewed as the inherently dangerous business of railroading. This benevolent purpose has no substantial connection with working conditions at a parent company or State agency that owns a separate, operating railroad which has its own separate FELA-protected work force.

The term "common carrier by railroad" had a settled, ordinary meaning in 1906; it has been interpreted consistently since then. It covers only entities that directly provide the transportation services, not their parents or other affiliates. In an early FELA decision, this Court held that a "common carrier by railroad" is "a ***railroad company*** acting as a common carrier." *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175, 187 (1920) (emphasis added). "This view not only is in accord with the ordinary acceptation of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a ***going railroad***." *Id.* at 187-88 (emphasis added). Applying this common-sense understanding that FELA only applies to a "railroad company" that is a "going railroad," the Court held that an express company that did not itself provide railroad transportation but used and paid others for such transportation was not a "common carrier by railroad" despite its intimate connection with railroading. *Id.* at 188.

The Court later relied on *Wells Fargo*'s "going railroad" definition in deciding that a company that owned, maintained, and leased railroad refrigerator cars to railroads for transporting perishable products was not itself a "railroad" within the scope of FELA. *Edwards* v. *Pacific Fruit Express Co.*, 390 U.S. 538 (1968). The Court stressed that, to be subject to FELA, an entity must be a "going railroad." *Id.* at 540-41. The Court emphasized that "there exist a number of activities and facilities which, while used in conjunction with railroads and closely related to

railroading, are yet not railroading itself." *Id.* at 540. Thus, FELA's text frames a simple, straightforward threshold question: Is the defendant a "railroad" in the ordinary meaning of that term? Only then is it necessary to ask whether the ***railroad*** is operating as a "common" carrier (as distinct from a private or contract carrier) or is conducting "interstate" (as distinct from purely intrastate) operations. The statute contains no textual hook for reaching the employees of a State agency or private parent company that is not actually a railroad.

This "plain language" interpretation hews closely to FELA's legislative purpose. Congress enacted FELA to respond to the special needs of ***railroad*** workers who are exposed to daily risks inherent in railroading. See *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 59 (1943); H.R. Rep. No. 60-1386, at 1-3 (1908). The statute imposes federal liability on "railroads" to provide compensation for on-the-job injuries sustained by their employees, but the Act is limited to the entities that function as actual railroads.

In 1939, Congress broadened the category of employees of a ***railroad*** who are entitled to FELA protection.[4] But as this Court explained in *Pacific Fruit Express*, *supra*, in reaffirming the "going railroad" test, Congress refused to enact a proposal "to broaden the meaning of railroads" under the Act and thus "declined to extend coverage of the Act to activities and facilities intimately associated with the business of common carrier by railroad" but not conducted by a "railroad." 390 U.S. at 541. In its quest to broaden the scope of covered "railroads," the Second Circuit simply blew past this red signal. Under this Court's "*Wells Fargo/Pacific*

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[4] Under the 1939 Amendment, covered employees include any "employee ***of a carrier***, any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce." Ch. 685, 53 Stat. 1404 (emphasis added). See *Reed* v. *Pennsylvania R.R. Co.*, 351 U.S. 502, 505 (1956).

Fruit" test, the MTA is not a "common carrier by railroad" because it is not itself a "going railroad" and does not provide "railroading" services. The only "railroad" involved in this case, and thus the sole entity governed by FELA, is the LIRR, a separate legal entity.

2. *Conflict With Other Circuits*. The Second Circuit stands alone in refusing to recognize, as other circuits have, that the threshold issue for FELA coverage is whether the defendant itself is a railroad, an entity engaged in the "actual performance of rail service." Compare, *e.g.*, *Iverson* v. *Southern Minn. Beet Sugar Co-op*, 62 F.3d 259, 262 (8th Cir. 1995); *Felton* v. *Southeastern Pa. Transp. Auth.*, 952 F.2d 59, 62 (3d Cir. 1992); *Sullivan* v. *Scoular Grain Co.*, 930 F.2d 798, 801 (10th Cir. 1991); *Kieronski* v. *Wyandotte Terminal R.R. Co.*, 806 F.2d 107 (6th Cir. 1986); *Lone Star Steel Co.* v. *McGee*, 380 F.2d 640, 647 (5th Cir. 1967).

Applying a plain language reading of the statute, these other circuits have refused to extend FELA coverage based on the theory, which the Second Circuit accepted, that a corporation becomes a "common carrier by railroad" when it is closely affiliated with an operating railroad, even though the defendant itself does not provide the rail services. Thus, in *Iverson*, the Eighth Circuit rejected the claim that a separate corporate "agent" of the railroad was covered, explaining that Congress had not extended FELA liability beyond the actual railroad itself. 62 F.3d at 264.

Similarly, in a case that is irreconcilable with the decision below, the Third Circuit in *Felton* rejected an effort by an employee of another regional transportation agency, the Southeastern Pennsylvania Transportation Authority (SEPTA), to hold that parent agency liable under FELA. The court reached that conclusion, even though SEPTA, like the MTA, is "organizationally affiliated with an interstate common carrier" and even though SEPTA actually controlled the operations of its various divisions, one of which, like the LIRR here, "is subject to FELA." 952 F.2d at 61. See also *Williams* v. *CSX Transp., Inc.*, No. 01-3433, 2002 WL

31618455 (E.D. Pa. Nov. 2002) (following *Felton*, refusing to hold railroad's corporate affiliate subject to FELA).

All this seemed settled until the Second Circuit revisited these concepts and, for the first time in a century of FELA jurisprudence, held that a parent may be liable under FELA because it exerts some control over a separately incorporated, operating railroad. In so holding, the Second Circuit mistakenly relied on *Lone Star Steel*, *supra*. There the Fifth Circuit created a test to determine when an operating ***railroad*** is an "interstate" railroad as distinguished from an intrastate railroad and is a "common" carrier rather than a private or contract carrier. *Id.* at 647. Some other circuits have used this test to guide the same inquiries. See, *e.g.*, *Iverson*, 62 F.3d at 262-63. The Second Circuit, however, misused the Fifth Circuit's test to answer a question for which the test had not been designed and for which no circuit had ever used it: to determine whether the defendant is a "railroad" in the first place The predicate for using the *Lone Star* test is that the entity in question first be a "railroad" engaged in the "actual performance of rail service," as it was in *Lone Star* and all of the cases cited.

3. *Irrelevance Of Section 7.* The Second Circuit also drew support for its expansive view of FELA by looking to Section 7, which states that the term "common carrier" includes "the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier." 45 U.S.C. § 57. The court misunderstood that section's limited scope.

First, this statutory provision does not, by its terms, reach the ordinary parent-subsidiary relationship. If it did, Congress simply would have stated that FELA applies to "***any*** person or corporation that owns, manages or operates a common carrier." The reference to "other persons or corporations charged with the duty" of operating a railroad is limited by the concept of "receiver or receivers" that precedes it. As the Court has noted, "a word is known by the company it keeps." *Sprietsma* v. *Mercury Marine*, 537 U.S.

__ (2002) (slip op. 10) (internal quotation marks omitted). The initial reference to "receiver or receivers" signifies the limited kind of legal successor in interest that Congress had in mind when it added to "receivers" "other" persons "charged with the duty" of operating a railroad. The statute embraces only similar kinds of persons who formally displace the owners and managers of the operating railroad as part of some legal substitution similar to receivership, for example, trusteeship. Cf. 49 U.S.C. § 11141 (for regulatory purposes, "rail carrier" includes "a receiver or trustee of a rail carrier").

This Court has recognized that this narrow provision in Section 7 does not provide a predicate for dramatically expanding the scope of FELA to reach ordinary corporate parents. In enacting Section 7, Congress merely "provided that railroad employees could recover regardless of the '***survival***' of the tortfeasor railroad" and the section simply allows a suit to "continue against the receiver ***or successor corporation*** of the railroad." *Cox* v. *Roth*, 348 U.S. 207, 209 (1955) (emphasis added). Thus, Section 7 deals with "persons or corporations" who, like "receivers," assume the legal status of successors in interest "charged with the duty" of running the railroad after some extraordinary corporate event. Section 7 assures that any FELA liabilities a railroad incurred will be satisfied by the "person or corporation" that takes over the railroad's assets and the "duty" of running the railroad, even if the original railroad corporation has ceased to have a separate, legal existence.

Second, influenced by concerns of federalism discussed above, this Court has presumed that, when Congress enacts a statute imposing civil liability on a "person," that term "does ***not*** subject a State (or State agency) to liability in such actions." *Stevens*, 529 U.S. at 787-88 (emphasis added). Thus, even if Section 7 applied to business corporations other than those serving as "receivers" or similar successors, the term "person" would not reach State agencies such as the MTA. In sum, no provision of FELA justified the Second

Circuit's imposition of liability on the MTA simply because it coordinates the affairs of its subsidiaries.

4. *Reliance On Irrelevant Decisions Under Other Statutes*. The Second Circuit went astray by uncritically applying language in some of this Court's cases upholding expansive coverage of railroad affiliates, such as terminal facilities and stockyards, under other federal statutes, such as the Interstate Commerce Act (ICA), which contain specialized definitions of covered entities.[5] The Second Circuit relied on two ICA cases, *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911), and *United States* v. *Union Stock Yard & Transit Co.*, 226 U.S. 286 (1912), for the proposition that "a company that has neither its own rolling stock nor corporate stock in railroad companies may be considered a 'railroad' if it is part of an integrated corporate family that includes common carriers by railroad and if it constitutes a necessary link to those carriers." Pet. App. 19a. From the proposition that some Interstate Commerce Commission (ICC) regulatory jurisdiction extends to an "integrated corporate family," the Second Circuit extrapolated to conclude that a holding company that owns a railroad subsidiary is a "railroad" for private FELA lawsuits.

The ICA, however, incorporated a specific definition of "railroads" that embraced many types of entities that were not "railroads" in the ordinary sense. See *Southern Pacific Terminal Co.*, 219 U.S. at 523. Congress evidently concluded that a special, expansive definition was necessary to assure that ICC regulation of the railroad industry would be effective. See, *e.g.*, *Union Stock Yard*, 226 U.S. at 308. Against this backdrop, this Court determined that the ICA

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[5] Also invoked were *United States* v. *Brooklyn E. Dist. Terminal*, 249 U.S. 296 (1919) (construing Federal Hours of Service Act, 45 U.S.C. §§ 61-64 (1986) (repealed 1994)), and *United States* v. *California*, 297 U.S. 175 (1936) (Federal Safety Appliance Act, 45 U.S.C. § 6).

swept broadly. See *Southern Pacific Terminal Co.*, 219 U.S. at 522-23; *Union Stock Yard*, 226 U.S. at 304.

FELA, by contrast, has no specialized statutory definition that would support interpreting the statutory term "railroad" as including an entity such as the MTA that is not a railroad. Moreover, there is no comparable legislative purpose to extend a private federal cause of action for negligence to employees of entities that are not railroads. Other circuits have explicitly rejected the approach taken by the Second Circuit and refused to rely on non-FELA cases in determining the reach of the statute. They adhere instead, in the words of the Tenth Circuit, to "the statutory requirements identified by the [Supreme] Court in *Wells Fargo* and *Pacific Fruit*", the "going railroad" test. *Sullivan*, 930 F.2d at 801. There the court declined to classify a joint venture between a warehouse lessor and a grain company that owned or leased miles of railroad track, hundreds of railroad cars and switch engines, as a "common carrier by railroad," because it was not a "going railroad." See *id.* at 800-01.

5. *Conflict With The Settled Framework Of Federal Regulation By Federal Agencies.* The Second Circuit's reliance on language lifted from decisions under the ICA is ironically misguided. The agencies administering the ICA (the ICC and its successor, the Surface Transportation Board (STB)) have never contended that an agency like the MTA becomes a "railroad" because it owns and controls a separately incorporated railroad subsidiary. Instead, the ICC declared that "a finding that States incur a common carrier obligation merely by owning a rail line" that is operated by a separate entity "is contrary to established Commission policy and contrary to the purpose" of the Act. *Common Carrier Status of States, State Agencies and Instrumentalities*, 363 I.C.C. 132, 1980 ICC LEXIS 73, *12 (1980). See, *e.g.*, 49 C.F.R. § 1150.22 (State agency "will be considered a common carrier" only if "the State intends to operate the line itself" but not if it uses a separate "operator to provide service over the line"; in that event, "only the operator incurs

a common carrier obligation.").

The ICC applied the same analysis to corporate parents of operating railroads. See, *e.g.*, *Guilford Transp. Indus., Inc.*, 366 I.C.C. 294 at 62-63 (1982) (a holding company that did not itself "provide any type of rail service" but "perform[ed] an oversight function, coordinating activities, and establishing policy" for its railroad subsidiary was not a "carrier" under the Act). In upholding this distinction, the D.C. Circuit observed, in words equally apt here, that "Congress understood the difference between a 'carrier' and a holding company that owns a carrier" and that, "if Congress had wanted to include holding companies within the ambit" of ICC regulation of common carriers by railroad, "it knew how to say so." *Lamoille Valley R.R. Co.* v. *ICC*, 711 F.2d 295, 329 & n.78 (D.C. Cir. 1983) (citing cases from other circuits "assuming that a holding company that owns a carrier is not itself a carrier").

Reflecting this settled distinction, federal regulation of the railroad industry, including the safety of railroad employees, focuses on the "rail carrier" itself, defined as the "person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5); see 49 C.F.R §§ 200.3(i), 214.3, 217.3(a), 218.3(a), 239.3(a). Similarly, the requirements for various federal regulatory approvals distinguish between the railroad company and the entity that controls the railroad company. *E.g.*, 49 U.S.C. §§ 10901(4), 11323(a)(5) (requiring approval of acquisition of control of a "rail carrier" by "a person that is not a rail carrier but that controls any number of rail carriers"). The Second Circuit's indiscriminate approach in applying FELA conflicts with this established distinction between railroads and their parents.

It also disregards the rulings of other federal agencies with jurisdiction over railroads. Those agencies, too, have concluded that the MTA and similar agencies are not "railroads" and their employees are not "railroad employees" for the purposes of federal statutes governing the rights of "railroad" employees. For example, the Railroad Retirement

Board (RRB) has specifically determined that the employees of the MTA Police Department, such as respondent Greene, are not covered by either the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231 *et seq.*, or the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351 *et seq.* See *Employee Service Determination: MTA Police Department* (RRB, May 21, 1998).

The National Mediation Board, which supervises labor relations in the railroad industry under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, similarly has ruled that the MTA and its employees are not covered under the Act, even though the MTA "provides substantial operating subsidies to its constituent" railroads and the "MTA board members serve as members of the boards of the constituent agencies of MTA," including the two railroads that are subject to the RLA (and to FELA as well). See *Application of Int'l Bhd. of Teamsters*, 8 N.M.B. 1, 3-4 (1980). Thus, the Second Circuit's decision to treat the employees of parent companies and State-created regional transportation agencies as employees of "railroads" deviates sharply from an otherwise consistent federal regulatory scheme.

Treating employees of a parent company or State agency as "employees" of a "common carrier by railroad" would introduce dramatic changes in labor relations. The RLA establishes a special collective bargaining regime plus an administrative apparatus headed by the NMB to govern the rights and responsibilities of "employees" of "railroads;" it affords them a right to strike. 45 U.S.C. § 151a. Expanding the universe of "railroad" employees would displace New York State labor policy, which, among other things, subjects police employed by the MTA to special State grievance procedures and prohibits them from striking. See N.Y. Civ. Serv. L. §§ 200 *et seq.* (Taylor Law); N.Y. Workers' Comp. L. § 2(3).

The Second Circuit's decision calls out for review to bring FELA coverage back into line with the rulings of this Court, other circuits, and federal administrative agencies.

III. An Entity That Owns And Oversees A Railroad May Be Treated As A "Railroad" Under FELA Only When A Claimant Establishes The Elements For "Piercing The Corporate Veil."

This Court frequently has declared that Congress legislates in light of common-law concepts, see, *e.g.*, *Meyer* v. *Holley*, 537 U.S. __ (2003) (slip op. 4-5), and Congress's enactment of FELA is no exception. See *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994) (common-law principles "are entitled to great weight in our analysis" when resolving FELA issues); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Buell*, 480 U.S. 557, 568 (1987) (same).

In *United States* v. *Bestfoods*, 524 U.S. 51, 72 (1998), the Court applied common-law principles of vicarious liability in a case under CERCLA. The Court ruled that, under the "bedrock principle" of limited liability of a parent corporation, a federal statute is presumed not to attribute to the corporate parent the responsibilities imposed on its subsidiary, except when "piercing the corporate veil" is permissible under common-law principles. The Court held that the very acts on which the Second Circuit here relied, "such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures," do not impute the subsidiary's legal burdens to the parent. 524 U.S. at 72.

In the Court's very recent decision in *Meyer*, *supra*, handed down several months after the Second Circuit issued its decision in this case, the Court reaffirmed the common-law principle that is dispositive here: A "corporation's liability may be imputed to the corporation's owner" only when the prerequisites for "piercing of the corporate veil" have been established. 537 U.S. at __ (slip op. 11). The Court explained that a departure from this common-law principle in favor of "unusually strict rules" is appropriate "only where Congress has specified that such was its intent." *Id.* at __ (slip op. 6). There the Court found that neither the

statute nor the legislative history disclosed a congressional intent to make "corporate owners * * * liable for the unlawful acts of a [corporation] simply on the basis that the owner * * * controlled (or had the right to control) the actions of [the corporation]." *Id.* at __ (slip op. 5). The decision below simply cannot stand in the face of this latest ruling reminding lower courts to respect the legal distinction between separate entities.

Indeed, this Court already has applied similar common-law standards in a related railroad context under the Transportation Act, 41 Stat. 456, limiting the circumstances in which "the dominant company" will be "liable for the injuries due to the negligence of the subsidiary company." *Davis* v. *Alexander*, 269 U.S. 114, 117 (1925). Other appellate courts have agreed that common-law standards for piercing the corporate veil must be applied before a parent's relationship with a subsidiary railroad may justify treating the parent as a "railroad" under FELA.[6]

The Second Circuit never denied that the MTA and the LIRR are sufficiently distinct to survive a "veil-piercing" inquiry. Applying New York common law, State appellate courts consistently have refused to pierce the LIRR's corporate veil. See *Noonan* v. *Long Island R.R.*, 551 N.Y.S.2d 232, 232 (App. Div. 1990); *Montez* v. *Metropolitan*

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[6] See, *e.g.*, *Southern Ry. Co.* v. *Crosby*, 201 F.2d 878, 881-82 (4th Cir. 1953) ("dominant [parent] railroad which controls and operates the business of a subsidiary" is subject to FELA, if subsidiary was "little more than a corporate pocket" of the parent); *Thaxton* v. *Norfolk S. Ry. Co.*, 520 S.E.2d 735, 739 (Ga. Ct. App. 1999) (holding company that owned a railroad subsidiary is subject to FELA, if it "dominates" railroad subsidiary).

The ICC and its successor (the STB) use the "sham transaction" test in deciding whether to "pierce the corporate veil" and apply railroad labor-protective provisions to railroads' non-carrier parents and affiliates. *E.g.*, *GWI Switching Services*, 2001 STB LEXIS 656 at *14-*22; *South Kansas & Oklahoma R.R.*, 1992 ICC LEXIS 242 at *3-*8.

Transp. Auth., 350 N.Y.S.2d 665 (App. Div. 1974). It is "settled, as a matter of [New York] law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility." *Cusick* v. *Lutheran Med. Ctr.*, 481 N.Y.S.2d 122, 123 (App. Div. 1984).

Since the MTA's role in superintending the affairs of its operating railroad subsidiaries does not justify "piercing of the corporate veil," the Court should grant certiorari for plenary review of the decision below. Alternatively, the Court should grant the MTA's petition, vacate the decision below, and remand for reconsideration in light of *Meyer*.

IV. The Issues Are Important Because They Affect Other Government-Created Regional Transportation Agencies As Well As Private Corporations That Own Operating Railroads.

The decision below is obviously important to the MTA and the thousands of MTA employees who are not actually employed by one of the MTA's operating railroads but who may now seek access to federal courts to litigate their accident claims under substantive federal law. Pending within the Second Circuit are more than a dozen cases involving FELA claims by MTA employees, most involving auto accidents or "slip and fall" claims.

1. *Other Transportation Agencies*. By disregarding the MTA's status as a "public authority," the Second Circuit also has exposed to FELA suits other regional transportation agencies that oversee commuter railroads within the circuit. Even more broadly, the Second Circuit's decision flashes a green light inviting FELA suits against regional transportation agencies nation-wide that own or coordinate commuter railroads. State legislatures around the country have created agencies similar to the MTA and charged them with responsibility for coordinating regional transportation. This assignment typically includes arranging passenger rail service. Some agencies provide the rail service themselves.

Others, like the MTA, own and oversee separate operating railroad companies (whose own employees are, of course, covered by FELA). Indeed, the Federal Government's own Department of Transportation falls in this category because of its ownership and oversight of Amtrak. See 49 U.S.C. § 24304(d)(1) (1994) (amended 1997) (Secretary of Transportation owns preferred stock equal to funds appropriated to Amtrak); 49 U.S.C. § 24302 (a)(2) (pursuant to which the President has appointed the Secretary as one of seven voting board members of Amtrak). A third group contracts with independent railroad companies (also covered by FELA) to provide the service. Almost two dozen other government-created commuter rail authorities — and the Department of Transportation — would be subject to FELA under the Second Circuit's expansive interpretation. These regional agencies are listed at Pet. App. 49a.

As this case illustrates, FELA is irresistibly attractive to potential claimants seeking to enhance their financial opportunities through litigation. Mere acceptance of workers' compensation benefits may not foreclose a FELA claim. See, *e.g.*, *South Buffalo Ry. Co.*, 344 U.S. at 372-73. A FELA claim, unlike a typical workers' compensation claim, is not subject to a schedule of fixed benefits or a cap on monetary awards and includes potentially unlimited recovery for "pain and suffering" and other elements of alleged damages. See Baker, *Why Congress Should Repeal The Federal Employers' Liability Act of 1908*, 29 HARV. J. LEGIS. 79, 84 (Winter 1992). As a result, employees regard FELA suits "as preferable to workers' compensation acts." 2 LARSON'S WORKERS' COMP. LAW § 2.08, at 2-16 (1999). The Second Circuit's decision invites the employees of other regional rail transit agencies to bring FELA lawuits against them in federal court. Litigation of these claims will tax the limited resources of these public-service agencies.

2. *Parent Corporations*. The Second Circuit's test also applies to any business corporation that owns an operating railroad company and uses its ownership for the

conventional purpose of supervising its subsidiary's affairs. In extending FELA to parents of operating railroads, the court did not distinguish between public and private parents. Indeed, in justifying its conclusion, the court relied exclusively on cases involving commercial railroads and their affiliates.

Moreover, the 1939 amendment to FELA authorizes federal claims against a covered "railroad" not only by workers directly involved in railroading but also by other employees, ***including clerical and supervisory personnel***, whose duties "further or substantially affect transportation." *Reed*, 351 U.S. at 505. The Second Circuit's misguided approach, expanding the number of covered "railroads," thus enormously increases the number of potential FELA claimants and federalizes the accident claims of employees of all the corporate parent companies that own the Nation's passenger and freight railroads.

There are more than 550 different freight and passenger railroads operating in this country potentially affected by the decision below. See U.S. Department of Transportation, Bureau of Transportation Statistics, TRANSPORTATION STATISTICS 2001, Table 1.2. Many of those companies have operations within the Second Circuit or are amenable to suit there. Since State worker-compensation benefits may not bar FELA claims, the ability to pursue federal compensatory damage awards, particularly within the Second Circuit, will prove irresistible to thousands of employees who have not previously been thought to be covered by FELA.

3. *Federal Courts*. Even as Congress actually drafted FELA, covering only employees of "going railroads," the statute places substantial burdens on the courts. In the five years from 1996 to 2000, railroad employees filed over 32,000 FELA suits against the Nation's operating railroads. See *Amicus* Brief of Association of American Railroads in Support of Petition in *Norfolk & Western Ry.* v. *Ayers*, *supra*, at 2 n.5. If left intact, the Second Circuit's decision inevitably will encourage employees of State agencies and

holding companies located in other circuits as well as the Second Circuit to transform their local, work-related accidents into FELA claims subject to federal court jurisdiction. It is not hyperbole to say that the Second Circuit's decision opens the federal court-house door to thousands of employees not properly within the ambit of congressional coverage. Review of that decision is, therefore, important to the Nation's federal courts.

In light of the practical problems posed by the Second Circuit's decision, it is important for this Court to reinstate a bright-line standard for distinguishing those employees who may bring their accident cases into federal court under FELA from those who must pursue traditional State remedies. Only employees of the operating railroad itself — the "going railroad" — fall on the FELA side of the line. Employees of parent corporations and State transportation agencies that own or control railroads that have separate workforces must rely upon their State remedies.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. Alternatively, the Court should grant the petition, vacate the decision below, and remand for reconsideration in light of *Meyer* v. *Holley*, 537 U.S. __ (decided January 22, 2003).

Respectfully submitted.

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